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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 16, 1993

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: The Coalition For Wireless Cable -
28 GHz Comments
CC Docket No. 92-297

Dear Ms. Searcy:

On behalf of our clients, The Coalition for Wireless Cable, there is submitted herewith, pursuant to Section 1.419 of the Commission's rules, an original and nine copies of the Coalition for Wireless Cable's Comments regarding the 28 GHz rulemaking.

Please direct any inquiry concerning this submission to the undersigned.

Very truly yours,


Robyn G. Nietert

Enclosures
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Before the
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Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
)
Rulemaking to Amend Part 1 and) CC Docket No. 92-297
Part 21 of the Commission's Rules)
to Redesignate the 27.5-29.5 GHz) RM-7872; RM-7722
Frequency Band and to Establish)
Rules and Policies for Local)
Multipoint Distribution Service;)
)

To: The Commission

COMMENTS OF COALITION FOR WIRELESS CABLE

Submitted by:

COALITION FOR WIRELESS CABLE

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March 16, 1993

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TABLE OF CONTENTS

	<u>Page</u>
Summary.	ii
I. Introduction	1
II. Set-Aside for Local Wireless Cable Operators	2
III. Cable/LMDS and Telephone Company/LMDS Cross-Ownership Restrictions	10
IV. Allocate LMDS Licenses by Random Lottery	12
V. Conclusion	14

SUMMARY

The Coalition for Wireless Cable supports the Commission's stated goals as set forth in the NPRM. The Coalition for Wireless Cable favors the proposals in the NPRM to divide 28GHz spectrum into two license blocks of 1000 MHz each.

The Coalition for Wireless Cable strongly urges the Commission to reconsider its tentative decision not to set-aside one of the two LMDS spectrum blocks within each Basic Trading Area for use by an existing local wireless cable operator. There is both precedent and a compelling public need for a set-aside of one of the two proposed licenses in a Basic Trading Area for an existing local wireless operator who can offer a reasonable expectation of prompt LMDS service to consumers.

LMDS is a wireless technology; many of its operating and administrative components are identical to MDS. Wireless operators have a presence in many markets and have developed considerable expertise in developing wireless systems. Moreover, in today's rapidly evolving video delivery marketplace, wireless operators face an urgent need to expand channel capacity. A set-aside of one LMDS license block for wireless operators is a fair and practical way to enhance wireless cable as a competitor to the cable industry and facilitate the introduction of LMDS to consumers.

The Coalition for Wireless Cable urges the Commission to adopt cross-ownership restrictions unique to 28 GHz. There is a fundamental need for both Cable/LMDS and Telephone Company/LMDS cross-ownership restrictions. As a wireless communications technology, LMDS must be allowed to emerge as a competitive force in the video delivery marketplace. The cable industry and the telephone companies can not be permitted the opportunity to use their tremendous resources and market power to co-opt LMDS technology in an effort to quell competition in video delivery and non-video communications. Cross-ownership restrictions would be consistent with both Commission precedent and policy and Congressional intent as demonstrated in the Cable TV Consumer Protection and Competition Act of 1992.

The Coalition for Wireless Cable supports the Commission's efforts to deter speculative applicants. To expedite LMDS service to consumers, the Commission should allocate licenses by lottery. The Coalition urges the Commission to require LMDS applicants demonstrate financial qualifications, meet the letter perfect standard, and file under a one calendar-day window.

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To: The Commission

COMMENTS OF THE COALITION FOR WIRELESS CABLE

The Coalition for Wireless Cable¹ (collectively "The Coalition"), by its attorneys, and pursuant to Section 1.419 of the Commission rules, hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, FCC 92-538, released January 8, 1993 ("NPRM") in the above-captioned proceeding. The NPRM, initiated in response to a Petition filed by Suite 12 Group, proposes to redesignate use of the 28 GHz band from point-to-point common carrier service to a local multipoint distribution service ("LMDS").

I. Introduction

The Commission has tentatively concluded that video programming will be the largest and most commercially significant use of the 28 GHz band. As such, the Commission believes LMDS will

¹ The Coalition is comprised of the Grand Alliance Partnerships which are tentative selectees/licensees or operators in approximately 25 markets throughout the United States.

have the potential to provide much needed competition to franchised cable operators. See. NPRM at ¶ 16. The Commission seeks comments on issues relating to the proposed licensing and regulation of LMDS.

The comments of the Coalition will focus on licensing issues with the goal of facilitating LMDS to the public by involving current conventional wireless operators in the development of LMDS. To this end, the Coalition urges the Commission to set-aside one full 1000 MHz block in the 28 GHz band (27.5 - 28.5 or 28.5 - 29.5) in each proposed Basic Trading Area ("BTA") to the current licensed wireless operator in that BTA who can offer a reasonable expectation of prompt LMDS service to consumers. Further, the Coalition strongly believes that the public interest would be best served by promulgating both Cable/LMDS and telephone companies/LMDS cross-ownership restrictions. Finally, in order to speed the LMDS licensing process, the Coalition recommends that the Commission allocate LMDS licenses by random lottery.

II. Set-Aside for Local Wireless Cable Operators

In its NPRM, the Commission proposed that the 28 GHz band initially be licensed in two blocks of 1000 MHz each to two separate licensees. See NPRM at ¶20-21. In order to facilitate video delivery, the Commission proposes to divide each 1000 MHz license into channels of 20 MHz each, thereby providing the capability of delivering a minimum of 49 channels of video

programming. Id. This licensing scheme would, if adopted, enable the two LMDS operators licensed in each BTA to deliver up to 50 channels each of video programming -- far more channel capacity than a conventional wireless operator can currently obtain.

The Coalition urges the Commission to adopt a two block licensing scheme.² But more importantly, the Coalition strongly urges the Commission to set-aside one of the two 1000 MHz licenses within each proposed BTA for use by the wireless cable operator who can offer a reasonable expectation of prompt LMDS service to consumers. As demonstrated below, there is both precedent and a compelling public need for such a set-aside format.

Preliminary, the Commission has clear authority to adopt the set-aside proposed herein. The two-block LMDS licensing format is similar to that adopted by the Commission in the cellular telephone licensing allocation. See Amendment of the Commission's Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Report & Order, 98 FCC 2d 175 (1984) ("Cellular Report & Order"). In licensing cellular systems, the Commission allocated one block of frequency to existing wireline

² In ¶ 21 of the NPRM, the Commission briefly discussed the possibility of further dividing the allocation into, For example, four blocks of Spectrum. The Grand Alliances strongly oppose further subdivision of the spectrum. Dividing this spectrum further would fragment channel capacity, subjecting future LMDS operators to the same channel capacity limitations wireless operators currently experience.

carriers in the local service area and the second to non-wireline carriers. The Commission rationale then was that the set-aside was the most practical way of making cellular telephone service available to the public to a substantial number of the largest urban areas within three to five years. The Commission based its decision on several other important considerations. First, it noted the pressing need for cellular service to relieve the severe congestion existing on conventional two-way mobile systems around the country. Second, the Commission concluded that wireline carriers have distinctive technical capabilities, and presence in most markets, which it reasoned would expedite cellular service to the public. The Commission considered the wireline providers technical expertise, the need for prompt service, the avoidance of delay, and the safeguards it puts in place to avoid anti-competitive practices, as paramount in its decision to set-aside one block for the wireline competitors. Cellular Report & Order, 98 FCC at 177.

Virtually all of the criteria that led to the cellular set-aside favor an LMDS set-aside for licensed wireless operators. First, there is an immediate need for a viable competitor to franchised cable operators in virtually every market in the United States. Allocating one of the two 1000 MHz blocks in the 28 GHz band to the wireless operator in each BTA would undoubtedly expedite LMDS service to consumers in these markets. LMDS is a wireless technology; while its technical configuration differs from

conventional wireless cable, many of its essential operating and administrative components are identical to Multipoint Distribution Service ("MDS").³ After a decade of development, wireless operators have established a presence in numerous large and small markets throughout the United States. There are currently nearly 100 operating wireless systems. In most markets, one wireless entity has typically consolidated the channel groups in order to develop the systems. These wireless operators have developed considerable expertise in the industry; they can most expeditiously build and operate LMDS systems.

Further, a set-aside would also compliment the Commission's recent decision to allow wireless cable entities exclusively to utilize available Instructional Television Fixed Service ("ITFS") frequencies in order to expand channel capacity and spur development of competition for the cable industry. The Commission provided that only wireless entities offering a "reasonable expectation" of prompt wireless cable service would be able to apply for the available ITFS licenses. It noted, that in order to meet the reasonable expectation standard, the wireless cable applicant must:

³ The term MDS is used to refer collectively to the single channel (MDS) and multi-channel (MMDS), multipoint distribution service facilities.

- (a) hold a conditional license, license, or a lease or must have filed an unopposed application for at least four MDS channels to be used in conjunction with the facilities proposed on the ITFS frequencies.
- (b) show that there are no unused MDS channels available for application, purchase, or lease that could be used in lieu of the ITFS frequencies applied for.

Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 69 RR2d 1499, 1513 at ¶ 54 (rel. Oct. 25, 1991).⁴

The Coalition proposes that a similar standard be required of wireless cable entities seeking the proposed set-aside LMDS allocation; that is, they must offer reasonable expectation of prompt LMDS service to consumers. A set-aside for local wireless operators who provide a reasonable expectation of prompt LMDS service offers a practical way to make an expanded alternative video delivery service available to the public in an expedited manner while also maintaining competition to the fullest extent possible.

⁴ The Commission also noted that a wireless cable entity may apply for an unused ITFS frequency at the same time it applies for the related MDS frequency, but if the MDS application is opposed by a mutually exclusive application or petition to deny, the application for ITFS facilities will be denied and that wireless cable entities licensed on ITFS channels will be subject to the one-year construction requirement. Id.

In addition to conforming with Commission precedent, a set-aside would best serve the public interest. Disallowing MDS operators the opportunity to utilize one block of LMDS spectrum would be both unfair, and antithetical to the Commission's stated desire to foster competition in video delivery. For nearly a decade, wireless cable operators have struggled to compete with the cable industry. Despite the inherent technical advantages wireless cable enjoys over cable, the industry is hindered in its efforts to bring genuine competition to cable. There is overwhelming agreement that this is due in large measure to the channel capacity limitations wireless cable operators have faced since the inception of the technology. Prospective wireless cable operators find it costly, time-consuming and sometimes simply impossible to secure sufficient channel capacity needed to build competitive systems.

In the NPRM, the Commission rejected the notion of allocating one 50 channel block to wireless operators, simply stating that wireless operators have a "de facto" head start. See NPRM at ¶ 18-19. The Commission's conclusion is not borne out by the realities of wireless cable operators. While it is true that wireless cable has been around for nearly a decade, throughout this time prospective wireless operators have been hampered by an unnecessarily burdensome regulatory environment. The Commission's own rules governing MDS, ITFS and Operational Fixed-Microwave Service ("OFS") channels have frustrated the emergence of more

numerous wireless cable systems. The Commission itself recently acknowledged that its regulatory policies in this area:

were not integrated in a way to fully exploit the potential of [a wireless cable] industry to compete in that marketplace if provided with adequate channel capacity, signal coverage and other capabilities. Instead, the rules in the various services were developed independently, focusing on the character and individual needs of the particular limited function originally anticipated for each service, with little consideration given to coordination among the services. Consequently, the rules and policies governing the spectrum assets that can be assembled and utilized by [wireless cable] operators not only contain possibly obsolete provisions, but also vary substantially from service to service. These restrictions and variations have adverse effects on [wireless cable] operators in terms of capability, convenience and simplicity of use, and consequently on [wireless cable]'s competitiveness in today's multichannel video marketplace, which is increasingly characterized by high capacity systems.

Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules, Pertaining to Rules Governing Use of the Frequencies in the 2.1 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service and Cable Television Relay Service, 5 FCC Rcd 971, 976 (1990).

The Commission has only recently confronted the problems which have plagued the wireless industry by enacting rule changes designed to eliminate the obstacles that hinder wireless operators and limit capacity, such as spectrum shortage, ownership restrictions and burdensome rules governing ownership and transfer.

Id. But even these changes may be too little and too late. The freeze on filing new MDS and ITFS applications and the tremendous backlog in MDS continue to frustrate development of systems with sufficient channel capacity. Moreover, the channel capacity gap is widening drastically. A set-aside of one block of 28 GHz spectrum for use by wireless operators is critical to the survival of the conventional wireless industry. The reality is that in today's rapidly evolving communications marketplace, wireless operators could face certain extinction without a set-aside. Cable systems, particularly the large MSO's, are rapidly expanding channel capacity by utilizing digital video compression and optical fiber. In a very few years, systems like Time Warner's "Quantum" fiber-based system in Queens, New York, delivering nearly 150 channels of programming, will be the norm, rather than the exception.

Moreover, in its recent Video Dialtone proceeding, the Commission adopted rule changes permitting the telephone companies to participate in the video distribution market through the provision of video dialtone services and limited ownership of video programming. See In the Matter of Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report & Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5069 (1992). The telephone companies are actively pursuing the business of video delivery, as evidenced by Bell South's recent purchase of two cable

television systems in Arlington, Virginia.⁵ Ultimately, the telephone companies, once allowed to fully compete in video delivery, will utilize their behemoth size and resources, existing fiber networks, and expertise to deliver hundreds of channels of video programming. Finally, competition from Direct Broadcast Satellite ("DBS") cannot be overlooked. DBS systems are set for launch this year and they too, will be able to deliver from 50-150 channels by programming.

Numerous wireless systems throughout the country have proven their ability to provide a high-quality low-cost alternative to franchise cable. But the continued inability of these operators to develop sufficient channel capacity will ultimately result in their being left behind. Without the means to drastically expand channel capacity in the near-term, these other video delivery systems will simply smother wireless operators. How can a potential wireless operator hope to convince investors that its system delivering 33-channels can compete with cable, telephone company, DBS, and presumably, LMDS systems -- all of which can deliver from 50 to 300 channels? How can a wireless operator thrive, when just to assemble 20 to 30 channels, it must wade through endless regulatory delays, backlogs, and costly and time consuming negotiations with channel group licensees? A set-aside

⁵ See. Fabricant, "Phone Company Breaks Ground By Buying Into Cable Television," *New York Times*, at A1 (February 10, 1993); Farhi, "Southwestern Bell to Buy Arlington, Montgomery Cable," *Washington Post*, at C1 (February 10, 1993).

of one block for wireless operators accomplishes two important public interest goals. It clearly enhances wireless as a competitor to cable and it facilitates the introduction of LMDS to consumers.

Furthermore, the Commission's conclusion that wireless cable's "de fact" head start already gives it some enormous advantage vis a vis new LMDS facilities is not supported by precedent. Significantly, in the cellular arena, the Commission specifically prohibited non-wireline operators from filing "head-start" petitions against wireline carriers in the same market which petitions sought to delay the introduction of cellular service by the wireline carrier, which was typically licensed first in a given market, until the non-wireline carrier had received its authorizations. The Commission found that the "head-start" did not in and of itself constitute an unfair or competitive advantage. Further, there was no concrete evidence that late entry into a market hampered the ability to compete. In the Matter of Amendment of Part 22 of the Commission's Rules to provide filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion and Order on Reconsideration, 69 RR2d 1277, 1299, (rel. Oct. 18, 1991.) Thus, the Commission's conclusion that the "head-start" allays any concerns over the ability of the existing wireless cable industry to compete with LMDS is unfounded.

III. Cable/LMDS and telephone companies/LMDS Cross-Ownership Restrictions

In the NPRM, the Commission tentatively concluded cross-ownership restrictions unique to the 28 GHz band were not necessary. The reason, the Commission stated, was that while video delivery appears to be the most likely primary use of the band, there is no assurance that it will be the case. See NPRM at 33-34.

The Coalition strongly urges the Commission to reconsider this proposal. Specifically, the Coalition recommends that the Commission adopt both Cable/LMDS and Telephone Company/LMDS cross-ownership restriction modeled after the ownership limitation imposed on cable television ownership of MDS. See 47 CFR §21.912. The Commission rationale in not proposing cross-ownership restrictions is far outweighed by the fundamental need for such restrictions: to enhance the potential for LMDS as a competitive force in the multichannel video distribution marketplace and prevent both cable and telephone companies from misusing their tremendous resources and market power to pre-empt competition in the delivery of video programming and other non-video communications services.

It is clear that Suite 12, the developers of LMDS and the initiators of this proceeding, intended for LMDS to primarily serve as a vehicle for wireless multichannel video delivery. Suite 12's

experimental system in New York is, according to reports, currently delivering 40 channels of programming including basic, premium and pay-per-view programming. LMDS was developed primarily for this purpose. The widespread interest generated by LMDS stems directly from the potential it holds as a wireless technology to deliver 50-100 channels of video programming at cost well below franchised cable. Cross-ownership restrictions must be established to allow LMDS the opportunity to emerge as a viable alternative to franchised cable. In the absence of cross-ownership limitations, both the cable industry and the telephone companies can and will co-opt this technology in an effort to quell competition.

Moreover, a cable/LMDS cross-ownership restriction would be clearly be consistent with Congress' intent to foster competition in the recently adopted Cable TV Consumer Protection and Competition Act of 1992, P.L. 102-386, ("1992 Cable Act"). As the Commission is well aware, Section 11 of the 1992 Cable Act amends Section 613(a) of The Communications Act of 1934 to add a prohibition against common ownership of a cable system and either a MDS or Satellite Master Antenna Television (SMATV) service that is separate from and in addition to its franchised cable service in the franchised are served by its cable system.

Congress's is clear intent was to encourage competition by prohibiting common ownership of different means of video delivery - specifically with regards to MDS and SMATV, the wireless systems

known to exist at the time the 1992 Cable Act was initiated. As LMDS is another variant wireless system, Congress almost certainly would have included it in the Cable/MDS-SMATV cross-ownership restriction had LMDS been more advanced in its development. Indeed, as the Commission noted in its NPRM, "it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of LMDS ownership if used to distribute video programming." See NPRM, at ¶¶ 33-34.

IV. Selection of Licensees by Random Lottery.

The Commission proposes to use random lotteries or competitive bidding to choose among mutually exclusive LMDS applications. See NPRM at ¶ 35. It noted that competitive bidding may be available if Congress enacts enabling legislation. Id. While the Coalition believes the prospects of Congress enacting legislation enabling the use of auctions are greatly enhanced due to the Clinton Administration's recent endorsement of auctions, it nevertheless urges the Commission to select LMDS licensees through random lottery.

The primary advantage of lotteries is the speed with which licenses can be allocated. And in this proceeding, speed is paramount. Consumers throughout the country have suffered from lack of competition in the multichannel video delivery marketplace. As Congress noted in the 1992 Cable Act, rates for cable service have increased dramatically, the majority of television subscribers have no opportunity to select between competing cable systems, and

the cable industry has become increasingly consolidated and monopolistic. Allocating LMDS licenses by random lottery is the most expeditious means available to the Commission to help remedy the need for competition with cable operators.

The Coalition whole-heartedly supports the Commission's goal of deterring speculative applications. The Coalition believes the Commission has proposed to implement many of the tools necessary to deter speculation. Specifically, the Coalition urges the Commission require that LMDS applications meet the "letter perfect" standard, NPRM at 16, ¶ 43, be required to demonstrate their financial qualifications by meeting the "firm financial commitment" standard required of cellular applicants below the top 120 market, NPRM at ¶ 45-47, and establish a one-calendar-day filing window for LMDS applications. NPRM at ¶ 49.

V. **Conclusion.**

The outcome of the LMDS proceeding is crucial to the healthy expansion of the wireless cable industry. Many entrepreneurs have followed the Commission's call for competition to cable by establishing wireless cable facilities at enormous personal time and expense. Adopting the set-aside format proposed

herein the Commission can support the developing wireless cable industry and ensure its critical evolution into a mature industry.

Respectfully submitted,

THE COALITION FOR WIRELESS CABLE

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